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No. 99-1786

In The

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., AND THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON AND ERIC KNUDSON,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The National Association of Subrogation Professionals, Inc. (NASP) moves pursuant to Supreme Court Rule 37.2(b) for leave to file an *amicus curiae* brief in support of Petitioners. This brief is filed with the consent of Petitioners, and a letter from their counsel reflecting their consent has been filed with the Clerk of the Court. After several calls and letters to Respondents' counsel, NASP's counsel has not received a consent letter from Respondents, and is therefore filing this motion to comply with Rule 37.2(b). On June 9, 2000, counsel of record for NASP filed a motion on behalf of the Self-Insurance Institute of America, Inc., for leave to file an *amicus curiae* brief (which was granted by the Court on January 22, 2001), and *amicus curiae* brief, in support of the petition for a writ of certiorari, and Respondents withheld consent to the filing of that brief. NASP is concerned about the abdication by federal court of their exclusive jurisdiction to enforce subrogation and reimbursement provision in ERISA-regulated plans, and the resulting threat to the financial integrity of such plans. For this reason, NASP respectfully requests that its Motion for Leave to File an *Amicus Curiae* Brief be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The National Association of Subrogation Professionals, Inc. (NASP) submits this brief in support of the position of Great-West Life & Annuity Insurance Company, Earth Systems, Inc., and the Health and Welfare Plan for Employees and Dependants of Earth Systems, Inc.[1]

NASP is a non-profit trade association of insurance company subrogation specialists, attorneys practicing in the field of insurance subrogation and recovery,[2] and vendors serving the subrogation needs of the insurance industry. NASP has approximately 1000 members, representing 150 insurance companies and self-insured entities. The purpose of NASP is "to create a national forum for education, training, networking and sharing of information and, ultimately, the most effective pursuit of subrogation on an industry-wide basis."

Through NASP, members are able to retrieve, organize, exchange information and expand the use of technology to promote subrogation efforts on a cost-effective

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[1] Counsel of record for NASP, Mark D. Spencer, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] In this brief and in the case law, the terms "subrogation" (the right to initiate and control litigation against a third party who injured the participant on whose behalf benefits were paid) and "reimbursement" (the right to require a participant to reimburse the plan from any recovery by the participant from the third party) are used interchangeably.

basis. The members of NASP seek to reduce subrogation barriers in support of Congress' enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1468 (ERISA). This includes rendering assistance to courts in their deliberations on significant ERISA subrogation issues of broad concern to members.

NASP has an interest in the ERISA jurisdictional issue presented in this case – whether an employee benefit plan fiduciary may seek to recoup benefits paid in third party liability situations through enforcement of subrogation provisions in the plan under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

First, the issue presented has enormous repercussions for every benefit plan in America, including both self-funded and fully-insured plans. Benefit plans and their participants will continue to bear the enormous burden of the escalating costs of offering health benefits if the plans and plan fiduciaries are unable to recover plan funds lost to participants who win judgments against third-party tortfeasors. The financial reality over time is devastating, ultimately resulting in a reduction in health care benefits for all plan participants or a significant increase in costs for the participant.

Second, Federal courts must not impede benefit plans' efforts to utilize the federal statutory mechanisms created to enable plans to enforce the provisions of ERISA and the terms of the plan, including terms requiring subrogation and reimbursement. This result would harm not only the plans, but also all of the participants who rely on the financial integrity of such plans for payment of their medical expenses. Federal courts should protect

benefit plans and their participants and beneficiaries collectively, rather than permit specific participants in sympathetic situations to evade their plan-established reimbursement obligations by forcing plans to wallow through expensive and time-consuming state court lawsuits.

Federal subrogation actions are essential to maintaining the financial health of ERISA plans. The General Accounting Office estimates that of the 144 million individuals with employer-based health coverage in 1989, approximately 117 million were in ERISA health plans. Moreover, it is estimated that 44 million individuals are participants in self-funded ERISA plans.[3] While dated, these figures demonstrate the wide use of ERISA plans, especially self-funded plans. Thus, it becomes even more important for federal courts to enforce ERISA civil actions so that plans can conserve their assets and maintain their financial viability.

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[3] *See* Employer-Based Health Plans: Issues, Trends, and Challenges Posed by ERISA (Letter Report, 07/25/95, GAO/HEHS-95-167).

ARGUMENT

If Federal Courts Abandon Their Exclusive Jurisdiction To Enforce Subrogation And Reimbursement Provisions In ERISA-Regulated Plans, This Will Effectively Jeopardize The Financial Soundness Of Such Plans. Federal Courts Cannot Abandon Their Exclusive Jurisdiction Over Subrogation And Recovery Actions By ERISA-Regulated Plans And Those Who Operate Them.

The case at bar involves a plan participant who violated the terms of the plan that required her to disgorge, reimburse and restore funds to the plan from any recovery from a third-party. *Great West Life & Annuity Ins. Co. v. Knudson*, No. 98-56472, 2000 WL 145374 (9th Cir. Feb. 7, 2000). 29 U.S.C. § 1132(a)(3) authorizes the plan's fiduciaries to bring an action for injunctive and equitable relief to enforce the provisions of ERISA and/or the reimbursement terms of the plan, and/or to redress violations thereof. *See Patterson v. Shumate*, 504 U.S. 753, 760 (1992). *Exclusive* federal jurisdiction over this action exists under 29 U.S.C. § 1132(e)(1). Federal courts have adjudicated these types of actions for several years. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). The Ninth Circuit held that federal jurisdiction did not exist in this action.

Perhaps the most forceful argument against the Ninth Circuit's ruling comes from the Respondents' own counsel, who told the Court in a letter dated March 20, 2001 that he could not argue in support of that ruling. Thus, the Petitioners, amicus supporting the Petitioners' position, Respondents' counsel, and ostensibly the Solicitor, are all in agreement that the Ninth Circuit's ruling was erroneous. Apparently, only Court-appointed amicus

will undertake the task of attempting to argue to the contrary.

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the Court held that the remedies provided in ERISA's civil enforcement section, 29 U.S.C. § 1132(a), were intended to be exclusive. The Court's analysis of Section 1132(a) in *Pilot Life* was of particular importance:

> The civil enforcement scheme of [Section 1132(a)] is one of the essential tools for accomplishing the stated purposes of ERISA. The civil enforcement section is sandwiched between two other ERISA provisions relevant to the enforcement of ERISA and to the processing of a claim for benefits under an employee benefit plan.
>
> * * *
>
> In sum, the detailed provisions of [Section 1132(a)] set forth a comprehensive scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in [Section 1132(a)] of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

Pilot Life, 481 U.S. at 52-53, 54 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

The "tools" of Section 1132 include broad equitable and injunctive relief,[4] enforcement by contempt,[5] nationwide service of process,[6] sue-or-be-sued status for benefit plans,[7] *ready* access to the federal courts (including the neutrality, caliber, and resources of Article III judges),[8] etc. This demonstrates that Congress intended to provide an exclusive, comprehensive, and nationwide forum at the federal level for resolving plan-related disputes, and to assure that the interested parties do not become bogged down in state court litigation.[9] This Court has

[4] 29 U.S.C. § 1132(a)(3)(B); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993).

[5] 29 U.S.C. § 1132(a)(3)(B)(ii); 29 U.S.C. § 1109; *Pane v. RCA Corp.*, 868 F.2d 631, 636-37 (3rd Cir. 1989).

[6] *See* 29 U.S.C. § 1132(e)(2); *Peay v. Bellsouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000); *Bellaire Gen. Hosp. v. Blue Cross/Blue Shield*, 97 F.3d 822 (5th Cir. 1996); *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992); *Rodd v. Region Constr. Co.*, 783 F.2d 89, 91 (7th Cir. 1986).

[7] 29 U.S.C. § 1132(d)(1).

[8] 29 U.S.C. §§ 1001(b), 1132(e)(1).

[9] Congress has provided litigants with similar tools in other federal litigation contexts such as the federal interpleader statutes, 28 U.S.C. §§ 1335, 2361. These statutes permit stakeholders to utilize statutory features such as the low jurisdictional threshold of $500.00 or more in dispute; nationwide service of process; orders restraining the initiation or prosecution of related litigation in other state and federal courts, etc. The federal interpleader framework is similar to the federal framework under Sections 1132(a)(3) and (e)(1). *See, e.g., Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 417-19 (6th Cir. 1997) (noting the equitable nature of interpleader under Section 1132(a)(3)(B)(ii)). The problems that would result if Congress abolished the interpleader statutes (*e.g.*, the inability to obtain jurisdiction and relief in a single nationwide forum) are similar to the problems that result from the Ninth Circuit's restrictive interpretation of Section 1132(a)(3).

held that statutory claims like the one at bar are equitable in nature. *See Mertens*, 508 U.S. at 248.

Unlike certain other civil actions under Section 1132(a), Section 1132(a)(3) does not define a class of proper defendants, and does not articulate the specific relief permitted in each particular situation. In contrast, an action under Section 1132(a)(1)(A) can only be brought against a plan "administrator," defined in 29 U.S.C. § 1002(16)(A), for the relief provided in 29 U.S.C. § 1132(c). Similarly, an action under Section 1132(a)(2) can only be brought against a plan "fiduciary," defined in 29 U.S.C. § 1002(21)(A), for the relief provided in 29 U.S.C. § 1109.[10]

This open-ended nature of Section 1132(a)(3) evidences Congressional intent[11] to permit civil actions for

[10] In 29 U.S.C. § 1132(e)(1), Congress permitted state courts to entertain one and only one type of action within this preempted field – an action for benefits under 29 U.S.C. § 1132(a)(1)(B), which is the only action that can be asserted for benefits, *see Taylor*, 481 U.S. at 62-63. In contrast, the other ERISA civil actions, including Section 1132(a)(3) actions, can only be adjudicated by a federal court.

[11] In *Pilot Life*, this Court discussed the "comprehensive civil enforcement scheme," the "carefully integrated civil enforcement provisions," and the "deliberate care with which ERISA's civil enforcement remedies were drafted" in analyzing Section 1132(a). The inclusion of an open and expansive civil action in Section 1132(a)(3) is significant in this respect.

sweeping relief against a wide variety of potential defendants – including plan participants who fail to honor their plans' reimbursement provisions and those acting in concert with them. In fact, because Congress displaced state causes of action within this completely pre-empted field and replaced them with ERISA's civil causes of action, *see Taylor*, 481 U.S. at 60, 62-66, Section 1132(a)(3) should be considered the "catchall" civil action for participants, beneficiaries and fiduciaries, because it is so open and expansive. A narrow reading of Section 1132(a)(3) (whether in terms of its jurisdictional or remedial scope) only serves to handicap the aforementioned parties from obtaining the access to and relief from the federal courts that is often so desperately needed within this pre-empted field.

An express Congressional goal in ERISA is to protect the "soundness and stability" and "financial soundness" of benefit plans, and to assure their equitable character. 29 U.S.C. § 1001(a). In connection with these objectives, group health plans typically contain subrogation and reimbursement terms. This enables plan fiduciaries to recover money for the plan from a participant who has obtained a judgment or settlement from a third-party tortfeasor. The concept is simple: the participant is injured by the tortuous conduct of a third-party, the participant incurs thousands of dollars in medical expenses for which the plan pays, the participant sues the third-party and settles or recovers a judgment (often encompassing medical expenses), and the participant repays the plan for the sums paid on the participant's behalf. *See Patterson*, 504 U.S. at 760.

The plan terms govern the relationship between the participants and the plans, and articulate an integral condition on which benefits are paid in the first place – plans pay benefits on the condition and expectation that the participant will reimburse the plan if the participant recovers from a third party. Plan fiduciaries utilize the tools under 29 U.S.C. § 1132, specifically including Section 1132(a)(3), to enforce these plan terms, and to protect against any attempts by participants and their attorneys to circumvent them. In essence, the plans seek the well-established equitable remedy requiring the participants to *specifically perform* according to the plan's reimbursement provisions.

One of the primary goals underlying Congress' enactment of ERISA was to protect the plan and all of its participants and beneficiaries collectively, not just one participant. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 141-42 & n. 9. Allowing the plan to enforce its reimbursement provisions is fair, otherwise, the participant would receive a double recovery: once from the plan and again from the third-party tortfeasor. Moreover, if participants are not required to reimburse their plans, there are less funds available to pay the meritorious claims of the other participants and beneficiaries. This penalizes the participants and beneficiaries collectively, and threatens the financial soundness of the plans.

The sums of money that are typically at issue are significant, and when left unrecovered results in depletion of plan assets that over time can have a devastating financial impact on the plan and the benefits participants receive. The case at bar is a subrogation action for $411,157.11. *See Knudson*, No. 98-56472, 2000 WL 145374

at *1. It is not unusual, considering the rising cost of health care in the United States and the relative ease of incurring a six-figure hospital bill with even a brief hospital stay, for subrogation actions to be for over a million dollars. *See, e.g., Shannon v. Shannon*, 965 F.2d 542 (7th Cir.), *cert. denied*, 506 U.S. 1028 (1992). Thus, by attempting to avoid the subrogation provisions in the plan – especially when the stakes are high – injured participants threaten the financial integrity of the plan in contravention of 29 U.S.C. § 1001(a). When federal courts help the participants by dismissing Section 1132(a)(3) subrogation actions, this contravenes 29 U.S.C. §§ 1002(b) & 1132(e)(1).

It is important to note that plans typically seek to enforce subrogation provisions only in cases *where the participant received compensation for the injury*. Frequently, however, federal courts refuse to grant this relief or even hear cases in which this relief is sought, by rationalizing away their jurisdictional obligations; for example by asserting that the remedy sought is "money" so the action is not equitable in nature. *See, e.g., Knudson*, No. 98-56472, 2000 WL 145374 at *2; *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1262 (9th Cir. 1997). Of course, the mere fact that a court enters an equitable decree that results in the payment of money does not mean that the action itself is "legal" rather than "equitable." *See, e.g., Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990). For example awards of money "damages" can be equitable when they are restitutionary, as in an action for

disgorgement of improper profits. *Id.* (citing *Tull v. United States*, 481 U.S. 412, 417 (1987)).[12]

In this type of action, the equitable remedy sought is *specific performance* of the terms of the plan that happen to require the payment of money. Additionally, if the participant has already recovered from a third-party tortfeasor, the remedy sought is one of *disgorgement* of funds that are being improperly retained in violation of the terms of the plan under which payment has been made. Federal courts cannot ignore their *exclusive*[13] jurisdiction over ERISA subrogation claims.

In *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976), this Court held that federal district courts cannot remand cases simply because they are "too busy" or do not want to adjudicate them. Congress, not the courts, decides the categories of federal subject matter jurisdiction, and courts are obliged to carry out Congress' will. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). Moreover, "federal

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[12] The Ninth Circuit's opinion in *Owens*, 122 F.3d at 1262, stands as a perfect example of the "legal" versus "equitable" semantics game that is being played in some of the lower federal courts. Terminology aside, it is clear that the plan and the employer in that case wanted the court to order the participant to restore funds to the plan as required by the terms of the plan. This could be characterized as specific performance, disgorgement, restitution, reimbursement, constructive trust, etc. In accusing the employer and the plan of doing so, it was actually the Ninth Circuit that attempted to "dance around the word," and in doing so, frustrated the plain jurisdictional requirements of ERISA.

[13] 29 U.S.C. § 1132(e)(1).

courts lack the authority to abstain from the exercise of jurisdiction that has been conferred [by Congress]." *Id.* at 358. Thus, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Pub. Serv.*, 491 U.S. at 358 (quoting *Cohens v. Virginia*, 19 U.S (6 Wheat) 264, 404 (1821)).

The Ninth Circuit's ruling here stands as a prime example of a federal court departing from its jurisdictional obligations under 29 U.S.C. §§ 1001 & 1132(e)(1). While the Ninth Circuit's decision may appear to lighten the federal caseload and help individual participants in sympathetic circumstances retain large sums, it has a devastating financial impact on benefit plans in general. The result is that plans are forced to seek relief in the state judicial systems, which is exactly what Congress intended to avoid by pre-empting state laws under 29 U.S.C. § 1144(a) & (c)(1), by creating an open-ended equitable cause of action to enforce the plan terms under 29 U.S.C. § 1132(a)(3), and by granting exclusive jurisdiction to the federal courts over such actions under 29 U.S.C. § 1132(e)(1).

In *New York State Conf. of Blue Cross/Blue Shield Plans v. Travelers Ins. Co.*, 514 US 645, 656-57 (1995), this Court held that the legislative purpose behind Section 1144(a) is to protect plans and plan sponsors from the varying laws of each state jurisdiction by implementing a federal

statute applicable to all benefit plans.[14] Subrogation actions are properly adjudicated under 29 U.S.C. § 1132(a)(3), and they should be resolved swiftly with a final equitable decree that is enforceable through the uncomplicated remedy of contempt. *See, e.g., Pane v. RCA Corp.*, 868 F.2d 631, 636-37 (3d Cir. 1989) (discussing how decrees under ERISA are enforced through contempt rather than through inefficient and cumbersome state post-judgment proceedings). The federal court simply orders the participant (and all persons acting in concert with the participant) to disgorge the funds at issue and reimburse the plan as required under its terms. Creative efforts by participants and their attorneys to thwart this – for example by attempting to characterize settlement payments as "non-medical," transferring funds to relatives or attorneys, moving to another jurisdiction, etc. – are easily remedied through federal contempt proceedings before the same court that ordered restitution. *See Pane*, 868 F.2d at 636-37.

On the other hand, when benefit plans are forced to litigate claims for reimbursement in state court, with attendant discovery disputes, jurisdictional, service of process and subpoena problems, jury trials, exorbitant litigation fees and costs, and post judgment hide-and-seek games, it is difficult if not impossible for plans to

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[14] *Travelers* also cited the Congressional discussion relating to the scope and purpose of Section 1144(a): " 'with the narrow exceptions specified in the bill, the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.' " *See Travelers*, 514 U.S. at 657.

successfully recover amounts that are plainly due under the terms of the plan. This frustrates the express goals and jurisdictional requirements of ERISA, and permits an inequitable double-recovery to the plan participant.

CONCLUSION

Subrogation provisions in ERISA plans are extremely important in controlling the cost of delivering benefits to working persons. Congress provided a way for plans to recover and replenish their assets by utilizing a federal statutory cause of action to enforce the relevant plan terms and to redress violations thereof. Congress entrusted the federal judiciary with the responsibility of adjudicating such actions. When federal courts ignore their exclusive jurisdiction over ERISA subrogation actions, it either leaves the plans without a remedy, or requires them to seek enforcement in more expensive, cumbersome, inefficient, and political state court proceedings. While this might be *perceived* on a shallow level as beneficial to an injured party, and to the federal caseload, in reality this is nothing more than an improper abdication of federal jurisdiction that has a much broader negative impact on benefit plans, their sponsors, their

participants and beneficiaries collectively, and to the delivery of health benefits to working women and men.

Respectfully submitted,

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